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September 17, 1998

VIA FEDERAL EXPRESS

Office of the Secretary
Federal Communications Commission
1919 "M" Street, N.W.
Room 222
Washington, D.C. 20554

Re: Comments on Direct Case; CC Docket No. 98-103

Dear Sir or Madam:

Enclosed please find an original and six (6) copies of the above-referenced document.

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Thank you.

Very truly yours,

GOODIN, MACBRIDE, SQUERI,
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Cynthia Addad

Cynthia M. Addad
Secretary to John L. Clark

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)

Pacific Bell Telephone Company) CC Docket No. 98-103
Pacific Bell Tariff FCC No. 128)
Pacific Transmittal No. 1986)

COMMENTS ON DIRECT CASE

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September 17, 1998

TABLE OF CONTENTS

SUMMARY

Pacific Bell's assertion that the Commission has jurisdiction over its ADSL facilities and services because they may be used by subscribers to access ISPs is groundless. Pacific Bell relies on the assumption that the Commission's jurisdiction is determined by the potential routing of Internet messages; however, the administrative and judicial decisions cited by Pacific Bell apply only to common carrier "communications" within the meaning of the 1934 Act. ISPs are not common carriers within the meaning of the 1934 Act, and the services they provide are not "communications" for purposes of jurisdictional determinations. Instead, ISPs are end users and the jurisdictional nature of the facilities or services that other end users utilize to access ISP services is based on the location of the ISP's POP and the demarcation point at the originating end user's premises. In nearly all instances, the provision of ADSL facilities to end users accessing ISPs' services, therefore, is jurisdictionally intrastate.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	CC Docket No. 98-103
Pacific Bell Telephone Company	)	
Pacific Bell Tariff FCC No. 128	)	
Pacific Transmittal No. 1986	)	

COMMENTS ON DIRECT CASE

Pac-West Telecomm, Inc. ("Pac-West") hereby files these comments in response to the Direct Case of Pacific Bell.[1]

INTRODUCTION

Pac-West provides intrastate competitive local exchange, local exchange access, and interexchange services in the California and Nevada, and also provides nondominant interstate and international switched voice telecommunications services pursuant to authorization granted by this Commission under 47 U.S.C. § 214. Among Pac-West's subscribers are Internet service providers ("ISPs)" to whom Pac-West terminates switched traffic and provides a variety of telecommunications and non-telecommunications services in competition with Pacific Bell, GTE California, and other incumbent and non-incumbent local carriers. Through innovative switching arrangements, which utilize low cost transport capabilities inherent in the public switched telephone network, Pac-West has enabled ISPs to expand their service offerings throughout California far more economically and quickly than

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[1] Concurrently herewith, Pac-West is filing substantively identical comments in CC Docket 98-79, which concerns a proposed ADSL offering by GTE.

otherwise would have been possible. This not only has increased the choices consumers have had for Internet services, it also has resulted in consumers receiving superior services, such as state-of-the-art 56K Internet service, not merely in core urbanized areas, but in sparsely populated rural areas where affordable high speed Internet access previously has not been available.

Pac-West believes that it is entitled to be compensated by Pacific Bell for carrying out the terminating switching functions associated with completing ISP traffic originated by their end users, and vice versa. In so doing Pac-West not only is incurring switching costs that Pacific Bell otherwise would be required to incur, it is also helping to alleviate terminating end office congestion and other problems plaguing Pacific Bell as the result the huge increase in Internet traffic that has taken place over the past few years. As this Commission well knows, Pacific Bell has attempted to avoid the obligation to pay such compensation by arguing that the completion of calls to ISPs is an interstate access service for which no such intercarrier compensation obligations arise. This issue is now before the California Public Utilities Commission ("CPUC"), where Pac-West believes it properly resides.

Although Pacific Bell has alleged that the jurisdictional issue in this proceeding does not affect the determination of jurisdiction with respect to the termination of calls by Pac-West and other carriers to ISPs over local switched facilities, Pac-West is nevertheless concerned about general mischaracterizations contained in Pacific Bell's filing relating to the jurisdictional nature of ISP services and the facilities and services that Pacific Bell, GTE, Pac-West, and other carriers furnish to enable end users to access ISP services.

As Pac-West explains below, the characterization by Pacific Bell of Internet transactions as "communications" is misleading and patently incorrect insofar as it is used to

support the proposition that the jurisdictional issue in this proceeding should be based on the beginning points (end users' PCs) and the terminating points (which, in some sense, may be anywhere in the world) of commonplace Internet sessions. This Commission and, so far, every state commission and every court that has considered the matter, have invariably distinguished between Internet services and the common carrier services used to access those services. Internet services are not common carrier services, and the transactions that take place over the Internet are not "communications" subject to Title II common carrier regulation under the Communications Act of 1934.[2] Therefore, for purposes of determining the jurisdictional nature of the facilities or services that are used to access ISPs' services, the beginning and ending points of the "communications" are the points of demarcation at end users' premises and ISPs' POPs. In most instances, such "communications" are local and jurisdictionally intrastate.

ARGUMENT

The Administrative and Judicial Decisions Cited by Pacific Bell Do Not Support the Proposition That Facilities and Services Used by End Users to Access ISPs Are Jurisdictionally Interstate

Pacific Bell cites a number of judicial and administrative decisions it contends establish the jurisdiction of ADSL and other facilities or services that end users may use to gain access to ISP services. These alleged "precedents" fall into two categories: (1) those that establish the jurisdiction of "communications" based on their points of origination and termination; and (2) those that define Internet transactions as "interstate commerce."

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[2] Communications Act of 1934, Act June 19, 1934, c. 652, 48 Stat. 1064, as amended, (codified as amended in Title 47, United States Code §§ 151 et seq.) (the "1934 Act")

However, neither of these lines of cases actually support Pacific Bell's position. Indeed, they are inapposite.

A. Internet Usage Does Not Constitute "Communications" for Purposes of Establishing Regulatory Jurisdiction

The principal argument proffered by Pacific Bell for the Commission's assertion of jurisdiction relies on the long line of judicial and administrative decisions holding that "communications" over wire or radio that begin in one state and end in another are interstate communications. However, Pacific Bell has taken this long standing legal doctrine out of context and applied it in an untenable manner. This doctrine relates only to the determination of regulatory jurisdiction over "communications" handled on an end-to-end basis by common carriers. The provision of Internet services, on the other hand, has evolved outside the sphere of common carrier regulation under the 1934 Act, with the result being that ISPs and other enhanced service providers ("ESPs") historically have been treated as end users rather than carriers. Consequently, as in the case of other communications to and from end users, communications to and from ISPs are deemed to end, for regulatory purposes, at the demarcation between the ISPs' facilities and the common carrier network.

1. ISP Calls Have Never Been Deemed a Part of Regulated Interstate Communications

The exclusion of Internet calls from the realm of "communications" subject to interstate regulation is not new. Ever since computers were first connected to the telephone network, the Commission has sought to maintain a distinction between the provision of computer-related services, which the Commission believed were not or should not be regulated under the 1934 Act, and regulated "communications" services. The initial attempt to do so was the Commission's "Computer I" decision, which it issued in 1971 following

five years of informal and formal study.[3] In that decision, the Commission attempted to accomplish its goal by classifying computer and communications services into four categories: (1) pure data processing; (2) "hybrid" data processing services "incidentally" involving communications; (3) "hybrid" communications services "incidentally" involving data processing; and (4) pure "communications" services, with only the latter two categories being deemed "communications" services subject to regulation.[4]

Soon, however, the continuing merger of computer and telecommunications technologies rendered the scheme of the Computer I decision too complex to administer and otherwise as hopelessly obsolete as the huge, central mainframe computers that were used at the time the Computer I inquiry began. This inability to effectively carry out its policy prompted the Commission to open another general inquiry in 1976 leading to the issuance of the "Computer II" decision.[5] Computer II took a similar, but somewhat more defined, track as Computer I and established that the scope of regulated "communications" should only include "basic" telephone switching and transmission services.[6] The decision provided that, with limited exceptions, all hybrid services that were "enhanced" by computer technology

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[3] Regulatory Pricing Problems Presented by Interdependence of Computer and Communications Facilities (1971), Final Decision and Order, 28 F.C.C.2d 267, 1971 FCC LEXIS 2066, aff'd. sub nom. GTE Service Corp. v. FCC, (2d Cir. 1973) 474 F.2d 724, decision on remand, (1973) 40 F.C.C.2d 293, 1973 FCC LEXIS 1822, ("Computer I").

[4] Computer I, Appendix A, 1971 FCC LEXIS 2066 **61.

[5] Amendment of § 64.702 of the Commission's Rules & Regulations,Second Computer Inquiry (1980) 77 F.C.C.2d 384, 1980 FCC LEXIS 188,Final Decision; modified on recon., (1980) 84 F.C.C.2d 50, 1980 FCC LEXIS 499, Memorandum Opinion and Order; further modified on recon. (1981) 88 F.C.C.2d 512, 1981 FCC LEXIS 346, Memorandum Opinion and Order on Further Reconsideration; aff'd. sub nom. Computer and Communications Industry Assn. v. FCC (D.C. Cir 1982) 693 F.2d 198, ("Computer II").

[6] Computer II, 77 F.C.C.2d 384, 387, 1980 FCC LEXIS 188 **4; see, also, 84 F.C.C.2d 50, 50, 1980 FCC LEXIS 499 **1,2.

would be excluded from regulation as "communications."[7] The Commission defined "enhanced" services as those which "act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information, or provide the subscriber additional, different, or restructured information, or involve subscriber interaction with stored information." A few subsequent decisions have allowed call enhancement functions such as "custom calling" and some protocol conversion to be offered by telephone companies as part of their regulated offerings under the theory that they were "ancillary" to "communications." However, for virtually all intents and purposes, the Commission's Computer II criteria for distinguishing between regulated "communications" and unregulated "enhanced" services remain in effect today, with Internet services clearly falling into the latter category.[8] Thus, the distinction between ISP services and the communications network services used to access ISPs is now very well established.

2. The Commission's So-Called Exemption of ISPs and ESPs From Interstate Access Charges Does Not Constitute a Determination That They Provide "Communications" Services Within the Meaning of the 1934 Act

In support of its argument that Internet transactions constitute interstate "communications" for purposes of invoking the Commission's jurisdiction under Title II, Pacific Bell points to the so-called "ISP exemption" from access charges as somehow being tantamount to a determination that ISPs are really communications carriers and that the traffic carried by them really should be deemed the same as any other communications. However, a careful review of the history of this "exemption" does not support this position.

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[7] Ibid.

[8] See, e.g., Computer III Further Remand Proceedings (1998) 13 FCC Rcd. 604, 1998 FCC LEXIS 459 *59-63.

Instead, the Commission's access charge decisions are fully consistent with the contemporaneous "Computer" decisions discussed above, in which the Commission determined that ISPs (actually their precursors) are not "communications" carriers.

At the same time as the Commission was wrestling with the task of defining the scope of regulated communications, competition was developing within the regulated communications industry, commencing with the introduction of competitive private line services to businesses by Microwave Communications, Inc. (now MCI Telecommunications Corporation), which was approved by the Commission in 1969.[9] Following the grant of interstate operating authority to MCI, a series of regulatory and judicial battles developed over the scope of services that MCI could provide, how interconnection should be accomplished, and how much competitors should be charged for use of the local exchange network. Then, in 1978, MCI and other new competitors entered into interim settlements with AT&T and a number of independent local exchange carriers providing for the competitive carriers to enter into agreements for "Exchange Network Facilities for Interstate Access" or "ENFIA" agreements.[10] The ENFIA agreements applied to message telephone service ("MTS") and wide area telephone service ("WATS") like services, but did not apply to other services. Instead, ESPs and others continued to obtain interconnection through local business rates.[11]

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[9] Application by MCI (1969) 18 F.C.C.2d 953 (not available on LEXIS), recon. denied, (1970) 21 F.C.C.2d 190, 1970 FCC LEXIS 1626.

[10] Exchange Network Facilities for Interstate Access (1979) 71 F.C.C.2d 440,1979 FCC LEXIS 649, aff'd. in part, MCI v. FCC (D.C. Cir. 1983) 712 F.2d 517.

[11] In the Matter of Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers (1987) 2 FCC Rcd 4305, ¶ 3, 1987 FCC LEXIS 3482 **4.

Subsequently, the Commission replaced ENFIA agreements with today's system of interstate access charges. At the time it was designing access charges, the Commission's objective was to distribute the costs of exchange access "in a fair and reasonable manner among all users of access service, irrespective of their designation as a carrier or private customer."[12] Included among these entities were ESPs, and even though ESPs are not carriers,[13] it nevertheless was the Commission's initial intent to apply access charges to them.[14] However, due to the impact that the application of access charges would have on ESPs, the Commission determined, upon reconsideration, that ESPs should be exempt from access charges for a period of time to allow them to adjust to the new access charge regime.[15] Accordingly, following the implementation of access charges, ESPs continued to connect to the regulated communications network by utilizing local business services.

In 1987, the Commission instituted a proceeding to revisit the application of access charges to ESPs, reiterating that its intent, all along, was that ESPs should pay access charges. However, following input by numerous parties, both pro and con, the Commission determined that it would not be appropriate, at that time, to apply access charges to ESPs. Instead, the Commission held:

> "[T]he current treatment of enhanced service providers for access charge purposes will continue. At present, enhanced

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[12] In the Matter of MTS and WATS Market Structure (1983) 97 F.C.C.2d 682, 711, 1983 FCC LEXIS 444 **66, Memorandum Opinion and Order ("First Reconsideration Order") (emphasis added).

[13] Ibid. (1983 FCC LEXIS 444 **65).

[14] Ibid.

[15] Id. at pp. 714-717 (1983 FCC LEXIS 444 **75-79).

> service providers are treated as end users and thus may use local business lines for access for which they pay local business rates and subscriber line charges."[16]

The differentiation between ESPs and interexchange communications carriers has not changed since the time the Commission issued the decisions addressed above. Moreover, the continued treatment of ISPs and other ESPs as end users has recently been confirmed by the Commission in its order restructuring the access charge regime. In that order, the Commission stated:

> "We decide here that ISPs should not be subject to interstate access charges. The access charge system contains non-cost-based rates and inefficient rate structures, and this Order goes only part of the way to remove rate inefficiencies. Moreover, given the evolution of ISP technologies and markets since we first established access charges in the early 1980s, it is not clear that ISPs use the public switched network in a manner analogous to IXCs. Commercial Internet access, for example, did not even exist when access charges were established. As commenters point out, many of the characteristics of ISP traffic (such as large numbers of incoming calls to Internet service providers) may be shared by other classes of business customers."[17]

Consequently, there is no reasonable basis for Pacific Bell's assertion that the so-called "access charge exemption" in fact has any bearing on the jurisdictional issue here. The provision of facilities and services allowing consumers to access ISPs, ESPs, and their hybrid "data processing" predecessors has consistently and continuously been deemed a

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[16] In the Matter of Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers (1988) 3 FCC Rcd 2631, 2633, 1988 FCC LEXIS 812 **19, Order, (fn. 53).

[17] In the Matter of Access Charge Reform (1997) 12 FCC Rcd 15982, 1997 FCC LEXIS 2591 * 362, First Report and Order.

matter subject to the regulatory jurisdiction of state commissions.[18] All of these entities, from their inception, have been treated as end users, not communications common carriers subject to regulation under the 1934 Act.

B. Cases Holding That Internet Transactions Constitute Interstate Commerce Are Inapposite to the Issue in This Proceeding

As noted above, Pacific Bell has also attempted to prop up its position that the provision of services to end users accessing ISPs is an interstate endeavor by citing to several judicial decisions holding that Internet transactions constitute interstate commerce or communications. However, these decisions are simply not relevant.

Transactions effected through communications sent by regular mail are also interstate commerce or communications. However, merely because they are interstate in nature does not make them interstate "communications" within the meaning of the 1934 Act. The issue in this proceeding is whether ISPs are engaged in the provision of interstate communications services subject to the 1934 Act, not whether they are engaged in interstate commerce or whether transactions that take place over the Internet might be called "communications" for other purposes. The cases cited by Pacific Bell simply do not stand for the proposition that calls to ISPs are jurisdictionally interstate for regulatory purposes. In short, they have no pertinence whatsoever to this proceeding.

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[18] For these same reasons, the local facilities and services used by other end users to access ISPs' services are properly deemed "local exchange," not "exchange access," facilities and services, just as facilities and services that are used by end users to access banks, hardware stores, and other businesses are deemed to be "local exchange" facilities and services.

CONCLUSION

It is certainly conceivable that some ADSL service offerings may be subject to the Commission's jurisdiction. However, the fact that subscribers to ADSL or other services may use those services in part or even exclusively for the purposes of accessing ISPs does not bring them within the Commission's jurisdiction. Instead, unless the common carrier facilities used to access an ISP cross state boundaries, the facilities are jurisdictionally intrastate.

Respectfully submitted this 17th day of September 1998,

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By: _____
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CERTIFICATE OF SERVICE

I, Cynthia Addad, certify that I have on this 17th day of September, 1998 caused a copy of the foregoing **COMMENTS ON DIRECT CASE; CC Docket No. 98-103** to be served on the parties on the attached service list by U.S. Mail or overnight delivery.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 17th day of September 1998 at San Francisco, California.

Cynthia Addad

Cynthia Addad

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